No. 14860

In the United States Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

MICHAEL GLENN, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, IDA MAE GLENN, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

BRIEF FOR APPELLANT

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INDEX

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JURISDICTIONAL STATEMENT

This action was brought against the United States under the Federal Tort Claims Act to recover damages for injuries allegedly incurred by the appellee as the result of the negligence of Government medical personnel during and immediately after his birth at a military hospital (R. 3–8). The jurisdiction of the district court was alleged to rest on 28 U. S. C. 1346 (b) (R. 4). On April 19, 1955, the United States District Court for the Southern District of California, Central Division, entered judgment for the appellee

(R. 75–76).[1] On May 24, 1955, the United States filed its notice of appeal (R. 76). The jurisdiction of this Court rests upon 28 U. S. C. 1291.

STATEMENT OF THE CASE

On November 12, 1953, Michael Glenn, appellee here, acting through his mother and guardian, Ida Mae Glenn, instituted this tort action against the Government in the United States District Court for the Southern District of California, Central Division (R. 3–8). The complaint alleged the following:

Plaintiff was born in the United States Naval Air Station Hospital at Seattle, Washington, on December 5, 1949 (R. 4). Previously, the Government, together with its employees at the hospital, had undertaken the prospective delivery of the child and, pursuant to that undertaking, said employees attended the child's birth (R. 4–5).[2] The complaint went on to allege negligence on the part of the Government personnel in prematurely and carelessly using clamps and forceps during the delivery of the child and dropping him to the floor immediately after birth (R. 5–8). As a consequence of these alleged actions, the complaint stated that plaintiff was injured in that he sustained "numerous bruises, abrasions, contusions, and lacerations over and about his head and body, a cerebral involvement, a spastic involvement, cerebral palsy, Little's disease, together with severe and profound physical and mental shock to his entire nervous sys-

[1] The opinion of that court is reported at 129 F. Supp. 914.

[2] Mrs. Glenn was the wife of a member of the Armed Forces and therefore qualified for care in a Government hospital.

tem," and that impairment of his faculties and his disabilities were of a permanent nature (R. 5–6). As compensation for the aforementioned injuries, the complaint sought $750,000 in general damages plus an amount in special damages, to be computed at the time of trial, which by then might have accrued (R. 8).

On January 18, 1954, the Government moved to dismiss the complaint on the grounds that it failed to state a claim upon which relief could be granted and that, since suit was instituted nearly four years after the alleged claim arose, the action was time barred by the two-year limitation on Tort Claims Act suits contained in 28 U. S. C. 2401 (b) (*infra,* p. 6) (R. 10). By order dated February 23, 1954, this motion was denied (R. 12–13). On February 25, 1954, the Government moved the district court to reconsider its order denying the motion to dismiss, and to dismiss the complaint (R. 14). The district court granted this motion on March 29, 1954, upon the sole ground that the complaint contained no allegation of any wrongful or negligent act on the part of any identified Government employee (R. 15–16). Plaintiff was granted leave to amend within fifteen days so as to remedy that defect (R. 16). On April 9, 1954, the plaintiff filed an amended complaint substantially identical to the original complaint with the added specification that Dr. Walter N. Hanson, Dr. R. F. Kerr, Nurse R. Armstrong, and Nurse C. Curran were the employees of the Government who either dropped the plaintiff or permitted him to fall to the floor thereby causing the alleged injuries (R. 17–23). On May 6, 1954, the Government answered, denying the allega-

tions of the complaint that there was carelessness or negligence upon its part or on the part of its employees during or after delivery, and denying that the plaintiff had been dropped (R. 23–28). The answer also asserted that the claim was barred by 28 U. S. C. 2401 (b) since suit was not instituted within two years after the claim accrued (R. 27).

Subsequent to a pretrial conference, the parties stipulated that the issues for trial were as follows: the alleged negligence of Government medical personnel during and after delivery; whether the child was dropped; whether the alleged negligence caused the injuries complained of; and, the nature, extent and duration of plaintiff's injuries (R. 35–37). Thereafter, an additional stipulation was entered into by the parties and approved by the court, whereby the Government, while still denying negligence or liability on its part, agreed to a partial compromise of the action in order to avoid a lengthy and costly trial on the above issues. (R. 52–57). The stipulation provided that if the court decided that a cause of action was stated in the complaint and that such cause of action was not time barred by 28 U. S. C. 2401 (b), judgment might be entered in favor of the plaintiff for $7,500 (R. 55–56). The stipulation expressly reserved the appellate rights of either party on the limitations question (R. 56).

On April 19, 1955, the district court, pursuant to a memorandum of decision (R. 58–71), entered judgment for the plaintiff (R. 75–76). The court held that this action was not barred by the two-year limitation on Tort Claims Act suits found in 28 U. S. C. 2401 (b),

in view of the minority and consequent legal disability of the plaintiff (R. 74). It ruled that plaintiff was covered by the disability provision contained in 28 U. S. C. 2401 (a) (*infra*, p. 6), which entitles an individual coming within its purview to three years after the cessation of a disability to institute suit (R. 74). The court reasoned that notwithstanding the independent and mutually exclusive statutory derivations of 28 U. S. C. 2401 (a) and 28 U. S. C. 2401 (b), the 1948 revision and codification of those sections in the present Judicial Code made the disability provision of Section 2401 (a) applicable to the limitations period specified in Section 2401 (b) (R. 62–69). Judgment was accordingly entered for the plaintiff in the amount of $7,500 (R. 76).

QUESTION PRESENTED

Whether the disability provision of 28 U. S. C. 2401 (a) is applicable to the time limitations on Tort Claims Act suits contained in 28 U. S. C. 2401 (b).

SPECIFICATION OF ERRORS RELIED UPON

1. The district court erred in not ruling that appellee's tort claim against the United States was time barred by the limitations provisions of 28 U. S. C. 2401 (b).

2. The district court erred in holding that the disability provision of 28 U. S. C. 2401 (a) carries over to the limitations provisions of the Tort Claims Act, as set forth in 28 U. S. C. 2401 (b).

3. The district court erred in entering judgment for the appellee.

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STATUTE INVOLVED

28 U. S. C. 2401 provides as follows:

> Time for commencing action against the United States.
>
> (a) Every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.
>
> (b) A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later, or unless, if it is a claim not exceeding $1,000, it is presented in writing to the appropriate Federal agency within two years after such claim accrues or within one year after the date of enactment of this amendatory sentence, whichever is later. If a claim not exceeding $1,000 has been presented in writing to the appropriate Federal agency within that period of time, suit thereon shall not be barred until the expiration of a period of six months after either the date of withdrawal of such claim from the agency or the date of mailing notice by the agency of final disposition of the claim.

SUMMARY OF ARGUMENT

The district court has held that the tort claim at bar, instituted nearly four years after the inception of the asserted cause of action, was not time-barred by the seemingly absolute two-year limitation on Tort

Claims Act suits, now contained in 28 U. S. C. 2401 (b). It reached this result by applying the disability provision of 28 U. S. C. 2401 (a), covering certain non-tort actions against the Government, to the independent time limitation on tort claims found in 28 U. S. C. 2401 (b).

The district court's holding is demonstrably unsound. The structure and content of the two subsections, their statutory derivations, and the relevant Reviser's Notes, conclusively show that the disability provision of 2401 (a) is not applicable to the tort action time limitations of 2401 (b). This inapplicability, moreover, comports with the consistent policy of Congress in other Federal acts conferring jurisdiction to sue in tort, and has been subscribed to by every other decision on this precise question. For these reasons the decision below should be reversed.

ARGUMENT

The Disability Provision of 28 U. S. C. 2401 (a) Does Not Toll the Two-Year Limitation on Tort Claims Act Suits Imposed by 28 U. S. C. 2401 (b)

A. Every Relevant Interpretative Factor Precludes the Applicability of This Disability Provision to 28 U. S. C. 2401 (b)

In reaching its decision, the court below laid overriding emphasis on the structure of 28 U. S. C. 2401 and the general language of the disability provision in 2401 (a). It acknowledged, however, that judicial inquiry did not end with an examination of the bare bones of the statute, and attempted to buttress its conclusion by a consideration of the history of this Code provision. We contend that the structure of this Code provision and its "plain language" (R. 69), consid-

ered in proper context, compel an opposite conclusion. Moreover, we submit, an analysis of the appropriate legislative material further undercuts the decision below.

1. Where revision or codification of existing law is concerned, resort is to be had to the laws, which were the subject of revision, to resolve anything left in doubt by the language or structural scheme used by the revisers, *United States* v. *Lacher,* 134 U. S. 624, 626 (1890); *United States* v. *Hirsch,* 100 U. S. 33, 35 (1879); *The Conqueror,* 166 U. S. 110, 122 (1897); *Barrett* v. *United States,* 169 U. S. 218, 227 (1898); *United States* v. *Grainger,* 346 U. S. 235, 247–248 (1953), rehearing denied, 346 U. S. 843; *Findlay* v. *United States,* 225 Fed. 337, 350 (C. A. 9) (1950); cf. *Northwestern Mut. F. Ass'n.* v. *C. I. R.,* 181 F. 2d 133, 135 (C. A. 9) (1950). Since proper resolution of the issue at bar is not feasible unless 28 U. S. C. 2401 is viewed from the perspective of its chronological development, it is appropriate that we first direct our attention to the statutory antecedents of this contested Code provision.

28 U. S. C. 2401 contains the limitations provisions of two separate statutes. 28 U. S. C. 2401 (a), wherein the disputed disability provision is found, is derived from Section 24 (20) of the Judiciary Act of March 3, 1911, 36 Stat. 1093, which, based on Section 2 of 1887 Tucker Act, 24 Stat. 505, gave the district courts concurrent jurisdiction with the Court of Claims in certain civil actions against the Government not exceeding $10,000 in amount which did not sound in tort. 28 U. S. C. (1946 Ed.) 41 (20). The 1911 Act

set a six-year limitation for institution of such suits but provided that in the event of certain enumerated disabilities the limitations period would be extended until three years after the disability had ceased. 28 U. S. C. (1946 Ed.) 41 (20).[3]

[3] 28 U. S. C. (1946 Ed.) 41 (20) provided as follows in pertinent part:

SUITS AGAINST THE UNITED STATES

The district courts shall have original jurisdiction as follows:

* * * * *

Twentieth. Concurrent with the Court of Claims, of all claims not exceeding $10,000 founded upon the Constitution of the United States or any law of Congress, or upon any regulation of an executive department, or upon any contract, express or implied, with the Government of the United States, or for damages, liquidated or unliquidated, in cases not sounding in tort, in respect to which claims the party would be entitled to redress against the United States, either in a court of law, equity, or admiralty, if the United States were suable, and of all set-offs, counterclaims, claims for damages, whether liquidated or unliquidated, or other demands whatsoever on the part of the Government of the United States against any claimant against the Government in said court; * * * No suit against the Government of the United States shall be allowed under this paragraph unless the same shall have been brought within six years after the right accrued for which the claim is made. The claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. All suits brought and tried under the provisions of this paragraph shall be tried by the court without a jury.

28 U. S. C. 2401 (b), in turn, is derived from Section 420 of the 1946 Federal Tort Claims Act,[4] which set forth the time limitations on tort actions against the United States under that Act, 28 U. S. C. (1946 Ed.) 942.[5] That section set a one-year limit on such actions (subsequently extended to two years by the Act of April 25, 1949, 63 Stat. 62), but made no provision for a tolling of the limitations period by virtue of any disability.[5]

In 1948, with the enactment of the present Judicial Code, 62 Stat. 869, *et seq.*, the provisions of the 1911 Act and the provisions of the Tort Claims Act which authorized the district courts to entertain suits against the United States in their respective categories, were grouped together as subsections of Section 1346 of Title 28, and denominated "United States as defend-

[4] The Federal Tort Claims Act was originally enacted as Title IV of the Legislative Reorganization Act of 1946, 60 Stat. 842.

[5] 28 U. S. C. (1946 Ed.) 942, provided as follows:

> Every claim against the United States cognizable under this chapter shall be forever barred, unless within one year after such claim accrued or within one year after August 2, 1946, whichever is later, it is presented in writing to the Federal agency out of whose activities it arises, if such claim is for a sum not exceeding $1,000; or unless within one year after such claim accrued or within one year after August 6, 1946, whichever is later, an action is begun pursuant to subchapter II of this chapter. In the event that a claim for a sum not exceeding $1,000 is presented to a Federal agency as aforesaid, the time to institute a suit pursuant to subchapter II of this chapter shall be extended for a period of six months from the date of mailing of notice to the claimant by such Federal agency as to the final disposition of the claim or from the date of withdrawal of the claim from such Federal agency pursuant to section 31 of this title, if it would otherwise expire before the end of such period.

ant." The limitations provisions of these two acts were also grouped together, as subsections of Section 2401 of Title 28, and labeled "Time for commencing action against the United States" (*supra,* p. 6). It was this collocation, together with certain changes in phraseology in the 1948 Code (discussed *infra,* pp. 13–17) upon which the decision of the district court was rested.

Until the decision below, however, suggestions of any interdependence of the disparate limitations of 2401 (a) and (b), by a strained reading of that section, had been emphatically rejected by the courts (*infra,* pp. 24–27). The departure from these decisions, and the intermingling of the two. subsections effected by the court below is, we submit, untenable.

2. We have already seen that Section 24 (20) of the 1911 Act, the precursor of 2401 (a), was enacted long before the Tort Claims Act, from which 2401 (b) was derived, became law. More importantly, the former Act, which expressly excluded tort suits from its purview, contained a disability proviso in its limitations section whereas the limitations section of the latter Act was not so qualified.[6] Palpably, the fact that these two different limitations provisions were grouped together for convenience as different parts of one section of the new Code by the 1948 revision of Title 28 did not manifest Congressional intent that the disability provision of the 1911 Act was to apply to tort claims litigation. Mere separation of portions of former statutes and regrouping them for convenience in code form does not

[6] As will be subsequently shown, this omission from the Tort Claims Act followed a consistent pattern of Congressional action in the area of tort litigation. *Infra*, pp. 20–24.

effect a change in the law. *Buck Stove Co.* v. *Vickers,* 226 U. S. 205, 213 (1912); *Hyde* v. *United States,* 225 U. S. 347, 361 (1912). Nor is the law varied by alterations in phraseology where such alterations are intended merely to restate pre-existing law in different terms or in a simplified form. See *United States* v. *Lacher,* 134 U. S. 624, 626 (1890); *Holmgren* v. *United States,* 217 U. S. 509, 519–520 (1910); *Anderson* v. *Pacific Coast S. S. Co.,* 225 U. S. 187, 199, 202–203 (1912); cf., *United States* v. *Grainger,* 346 U. S. 235, 247–248 (1953). The structure and terms of 28 U. S. C. 2401, and the Reviser's comments on the scope of the 1948 revision show that it is changes of this sort that we are dealing with here.

Twenty-eight U. S. C. 2401, as indicated, follows the pattern set by 28 U. S. C. 1346 in that it collocates parallel provisions of the 1911 Act and Tort Claims Act as separate subsections of a common section with a convenient reference denominator. The pre-existing independence of those provisions is, however, preserved. The exclusiveness of their identities is attested to by numerous factors, not the least of which is the utilization of separate subsections, each dealing with different categories of actions and each setting up different time limitations. This independence is further underscored by the language of 2401 (b), which states baldly, and without any reference to 2401 (a), with its six year time limitation and its three year disability provision, that "A tort claim against the United States shall be forever barred unless action is begun within two years after such claim accrued * * *" (*supra,* p. 6).

There is nothing in the legislative history of this codification which even suggests that the disability provision of 2401 (a) was designed to apply to 2401 (b). Nor is there any indication of such applicability in the exhaustive Reviser's Notes. Indeed, those Notes emphasize the mutual exclusiveness of the subsections, stating that 2401 (a) relates to the "time limitation for bringing actions against the United States under Section 1346 (a) of this title," which explicitly excludes tort actions, and that "Subsection (b) of the revised section simplifies and restates said section 942 [limiting torts actions against the Government in the former 28 U. S. C.] *without change of substance.*" (Emphasis supplied.) See Report No. 308, House Committee on Judiciary, 80th Cong., 2d Sess., p. A. 185.[7]

Notwithstanding the foregoing, the Court below seized upon the fact that the disability provision of the

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[7] In *The Judicial Code—1948 Revision*, 8 F. R. D. 439, William W. Barron, the Chief Reviser of Title 28, relates (8 F. R. D. at 441):

> There was no purpose on the part of the Revision staff to effect any change in existing law. Despite this, the process of comprehensively examining and rewriting the Code disclosed some grave disparities, inconsistencies and ambiguities not correctable by mere codification. * * * The Reviser and the Advisory Committee, upon discovering situations which would not yield to codification, felt in duty bound to apprise Congress of their findings and recommendations. Consequently a few such changes, substantive in nature, were recommended to Congress. These were carefully outlined in the Reviser's Notes and fully considered by the Judiciary Committees of both houses. * * *

Thereafter, the article goes on to discuss the nature of those substantive changes. No mention is made of any such change effected by 28 U. S. C. 2401.

1911 Act was revised in 2401 (a) of the 1948 codification to open with the phrase "[t]he action of any person under legal disability," and made that the prime basis for according it general applicability. However, apart from the fact that the structure of Section 2401, as well as the language of 2401 (b), belie such applicability, ascertainment of the effect of this language is not restricted solely to a consideration of the face of the statute, no matter how "clear the words may appear on superficial examination." *United States* v. *American Trucking Ass'n.,* 310 U. S. 534, 544 (1940). The appropriate legislative material, where it illuminates the Congressional intent, is also to be considered. *Heikkila* v. *Barber,* 345 U. S. 229, 233 (1953); *Switchmen's Union* v. *National Mediation Board,* 320 U. S. 297 (1943); *Helvering* v. *Morgan's, Inc.,* 293 U. S. 121, 126 (1934); *Ozawa* v. *United States,* 260 U. S. 178, 194 (1922). Here, an examination of the language of the provision prior to 1948, in the light of the authoritative Reviser's commentaries on the 1948 version, makes it clear that the prefatory words "any person under legal disability" were not intended to have, and did not have, the overriding effect ascribed to it by the district court. Rather they related, in a revised and simplified form, solely to the preceding sentence of 2401 (a) which set limitations on district court Tucker Act suits.

Under the 1911 Act, the disability provision, as found in Section 24 (20), was phrased in the following language:

> The claims of married women, first accrued during marriage, of persons under the age of

twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim, shall not be barred if the suit be brought within three years after the disability has ceased; but no other disability than those enumerated shall prevent any claim from being barred, nor shall any of the said disabilities operate cumulatively. [28 U. S. C. (1946 Ed.) 41 (20)]

The 1948 revision and codification placed the disability provision in 28 U. S. C. 2401 (a) and changed the language to read as follows:

> The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

As to this change of language, the Reviser's Notes following 2401 tell us:

> Words in subsection (a) of this revised section, "person under legal disability or beyond the seas at the time the claim accrues" were substituted for "claims of married women, first accrued during marriage, of persons under the age of twenty-one years, first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim." (See Reviser's Note under section 2501 of this title.)

The reference to the Reviser's Note following 28 U. S. C. 2501 refers to a disability provision governing Court of Claims actions against the Government under the Tucker Act, which provision is substantially

similar to the one here in controversy.[8] The Reviser's Note following that section states:

> Words "a person under legal disability or beyond the seas at the time the claim first accrues" were substituted for "married women first accrued during marriage, of persons under the age of twenty-one years first accrued during minority, and of idiots, lunatics, insane persons, and persons beyond the seas at the time the claim accrued, entitled to the claim." The revised language will cover all legal disabilities actually barring suit. For example, the particular reference to married women is archaic and is eliminated by use *of the general language substituted* (emphasis supplied).

From a reading of these excerpts, it must be apparent that "the general language substituted" (*supra*) was not intended to extend the scope of the disability provision beyond those non-tort causes of action previously covered in Section 24 (20) of the 1911 Act and now covered by 28 U. S. C. 1346 (a). Rather, as applied in such Tucker Act suits, it was designed to obviate any necessity of reference to specific disabilities, and to bring the disability provision into tune with what modern law considers to be a disabling legal status, *i. e.,* the change in status of married women.

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[8] 28 U. S. C. 2501 provides as follows in pertinent part:

> Every claim of which the Court of Claims has jurisdiction shall be barred unless the petition thereon is filed * * * within six years after such claim first accrues.
>
> * * * A petition on the claim of a person under legal disability or beyond the seas at the time the claim accrues may be filed within three years after the disability ceases.

If a change in the scope of the disability provision such as was propounded by the court below was intended, it is certainly remarkable that both the committee reports and the Reviser's Notes, although they meticulously chronicle every other change effected by the 1948 codification, make no mention whatsoever of the fact that Congress purportedly intended the disability provision of the 1911 Act to apply to tort actions against the Government, thereby effecting a significant change in the law and also reversing a previously established legislative pattern (see *infra,* pp. 20–24). This becomes even more unusual when one considers the Reviser's statement with regard to 2401 (b), that no substantive change was intended (*supra,* p. 13). Compare *Ex parte Collett,* 337 U. S. 55, 71 (1949).[9]

Moreover, several other aspects of the content and grouping of 28 U. S. C. 2401 are revealing. First, it is significant that the disability provision of 2401 (a) permits a three-year period for commencing actions

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[9] In Barron, *The Judicial Code—1948 Revision,* 8 F. R. D. 439, the Chief Reviser warns (at 445–446):

> Because of the necessity of consolidating, simplifying and clarifying numerous component statutory enactments no changes of law or policy will be presumed from changes of language in revision unless an intent to make such changes is clearly expressed.
>
> Mere changes of phraseology indicate no intent to work a change of meaning but merely an effort to state in clear and simpler terms the original meaning of the statute revised.
>
> Congress recognized this rule by including in its reports the complete Reviser's Notes to each section in which are noted all instances where change is intended and the reasons therefor.

after cessation of the disability. This, of course, is three years less than the six-year period for institution of suits allowed by this subsection to persons under no disability. However, this three-year period is *greater* than the two-year period allowed for institution of tort suits by 2401 (b), and indeed when 28 U. S. C. 2401 (b) first became law, only one year was permitted for the institution of tort claims. *Infra,* p. 10. Thus, if the disability provision of 2401 (a) were to be applied to 2401 (b), we would have the anomalous situation of a tort claimant having a longer period of time to institute suit *after* his disability was removed than he would have had there been no disability whatsoever. Such a result would be unique, insofar as we can discover, in the limitations field and indeed flies in the face of the rationale of disability exceptions to statutes of limitation.[10] It assuredly falls short of comporting with the district court's own recognition that "each part [of the Code] must be reasonably interpreted, harmonized, and effectuated in conjunction with the other parts" (R. 67–68). Congress can hardly be presumed to have intended such an incongruous limitations pattern.

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[10] Disability provisions are designed, at most, to permit affected persons to have the same period of time for institution of suits after cessation of the disability as would persons not laboring under such a handicap. In many cases, the time for instituting suits after the lifting of the disability is less than the original statutory period (see *e. g.*, 28 U. S. C. 2401 (a)), and a number of states merely allow several years in addition to the normal period and do not suspend the running of the statute until after the disability ceases. For a treatment of this question, see Blume and George, *Limitations and the Federal Courts*, 49 Mich. L. Rev. 937, 975.

Nor does the relative placement of the subsections of 28 U. S. C. 2401 indicate the creation of such a situation. If the disability provision of 2401 (a) were intended to apply to 2401 (b), the logical method would not have been to place it in 2401 (a) without any reference to tort actions, as was done here, but rather to place it either at the end of 2401 (b) with a reference to both subsections or in a separate subsection following both 2401 (a) and (b). The latter technique was precisely the one followed by Congress in manifesting its intent that the set-off and counterclaim provision of the 1911 Act was to apply both to Tucker Act suits under 28 U. S. C. 1346 (a) and Tort Claims Act suits under 28 U. S. C. 1346 (b). The set-off and counter-claim provision originally contained in the 1911 Act (see 28 U. S. C. (1946 Ed.) 41 (20), *supra,* p. 9), and incorporated by reference thereto in the later Tort Claims Act (see 28 U. S. C. (1946 Ed.) 932), was established as a separate subsection, 28 U. S. C. 1346 (c), in the 1948 revision, which stated:

> (c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

The placing of the counterclaim provision in a separate subsection following the 1911 Act and Tort Claims Act subsections of 28 U. S. C. 1346, and expressly relating its applicability to both, presents a marked and revealing contrast to the method which

the court below employed to read the disability provision of the 1911 Act into the Tort Claims Act.

B. The Absence of a Disability Extension for the Tort Claims Act Limitations Period Represents a Consistent Congressional Policy With Respect to Tort Actions

We deem it significant that in every other Federal statute dealing with Governmental or private tort liability and the time limitations thereon, Congress has not seen fit to include a disability provision. Neither the Suits in Admiralty Act, 47 Stat. 420, 46 U. S. C. 745; the Public Vessels Act, 43 Stat. 112, 46 U. S. C. 782; the Jones Act, 41 Stat. 1007, 46 U. S. C. 688; the Carriage of Goods by Sea Act, 49 Stat. 1207, 1208, 46 U. S. C. 1303; nor even the Federal Employers' Liability Act, 53 Stat. 1404, 45 U. S. C. 56, contain disability provisions. Moreover, the courts have rejected attempts judicially to engraft those acts with disability extensions for infancy. See *Sgambati* v. *United States,* 172 F. 2d 297 (C. A. 2) (1949), certiorari denied, 337 U. S. 938; *Osbourne* v. *United States,* 164 F. 2d 767, 768 (C. A. 2) (1947); *Kalil* v. *United States,* 107 F. Supp. 966, 967 (E. D. N. Y.) (1952); *Wahlgren* v. *Standard Oil Co. of New Jersey,* 42 F. Supp. 992, 993 (S. D. N. Y.) (1941).[11]

[11] The foregoing cases all deal with actions brought under the Suits in Admiralty Act, Public Vessels Act, or Jones Act. The following cases, construing the limitations provisions of the Federal Employers' Liability Act, have denied disability extensions for any reason. *Damiano* v. *Pennsylvania R. Co.*, 161 F. 2d 534 (C. A. 3) (1947), certiorari denied, 332 U. S. 762; *Bell* v. *Wabash Ry. Co.*, 58 F. 2d 569 (C. A. 8) (1932); *Frabutt* v. *New York C. & St. L. R. Co.*, 84 F. Supp. 460 (D. Pa.) (1949); *Alvarado* v. *Southern Pac. Co.*, (Tex. Civ. App.) 193 S. W. 1108; *Jordan* v. *Baltimore and Ohio R. Co.*, 135

In that light, mere collocation of the 1911 Act and Tort Claims Act limitations provisions, as subsections of a single section of the present Judicial Code, certainly cannot be taken as a manifestation of Congressional intent to have the disability provision of the former dilute the absolute limitations bar of the latter. Nor, in this same light, does the prefacing of the disability provision of 2401 (a) with the words "[t]he action of any person under legal disability" denote such a drastic change. "A few words of general connotation appearing in the text of statutes should not be given a wide meaning contrary to a settled policy excepting as a different purpose is plainly shown." *United States* v. *American Trucking Associations,* 310 U. S. 534, 543–544 (1940). See also, *Ginsberg and Sons* v. *Popkin,* 285 U. S. 204, 208 (1932); and cf. the admonition of the Chief Re-

W. Va. 183 (1950), 62 S. E. 2d 806; *Wichita Falls & S. R. Co.* v. *Durham*, 132 Tex. 143 (1938), 120 S. W. 2d 803; *Wade* v. *Franklin*, 51 Ohio App. 318 (1935), 200 N. E. 644; *Gauthier* v. *Atchison T. & S. F. Ry. Co.*, 176 Wis. 245 (1922), 186 N. W. 619; *Bement* v. *Grand Rapids & Ind. Ry. Co.*, 194 Mich. 64 (1916), 160 N. W. 424. In one case, *Scarborough* v. *Atlantic Coast Line R. Co.*, 178 F. 2d 253 (C. A. 4) (1949), certiorari denied, 339 U. S. 819, the Fourth Circuit held that whereas infancy would not toll the running of the limitations period under F. E. L. A., fraud would have that effect.

Osbourne v. *United States*, 164 F. 2d 767 (C. A. 2), holds that there is one exception to the rule that in the absence of a specific disability provision the limitations period in these statutes will not be tolled, and that is where there is impossibility of access to the courts such as might happen in wartime to foreigners, enemy aliens, or our own personnel who are prisoners of war. 164 F. 2d 767, 768–769. Cf. *Hanger* v. *Abbott*, 73 U. S. 532 (1867).

viser, *supra,* p. 17. The placement of the two subsections in relation to the disability clause, the absence of language directly relating the disability provision of 2401 (a) to the disparate and seemingly absolute bar of 2401 (b), and the Reviser's commentaries (*supra,* pp. 13–16), not only fail to show a departure from the limitations scheme established by the 1946 Tort Claims Act and other Federal tort statutes, but clearly manifest its continuance.

Perhaps the consistent Congressional policy of refusing to provide disability extensions to time limitations on tort actions is grounded on the nature of the action. Contract actions, the type of suits most frequently brought under 1346 (a), to which 2401 (a) applies, are more apt to have as the indicia of the cause of action and basis for recovery evidence that has been committed to written memorials, whereas, tort claims are generally almost entirely reliant on the transient and fading memory of witnesses. This difficulty with respect to tort litigation is compounded where the Government is the defendant. In many instances, the United States is without knowledge of injuries allegedly inflicted by an employee until suit is instituted. At that point, the employee involved may have terminated his Government service or become otherwise unavailable. Such factors, considered in conjunction with the magnitude of the Government's operations, underscore the progressive and often insurmountable difficulty in defending tort actions as the time between accident and suit increases.

The facts of the instant case are illustrative. In the nearly four years between the time appellee's cause of action arose and the time this suit was instituted, the medical facility at which appellee was delivered was closed and its records either transferred or destroyed (R. 49). Moreover, most of the personnel who participated or assisted in appellee's delivery had been discharged from the service and certain vital witnesses, such as the pediatrician who examined and cared for appellee after his birth, had not been located when trial was imminent (R. 49–51).

The impediments to the presentation of a proper defense after a four-year delay are readily apparent. To extend the potential limitations period on tort claims to twenty-four years, as the court below would do by its addition of a disability proviso to 2401 (b), would immeasurably increase such difficulties in these actions. Accordingly, the Congressional conclusion that a reasonable defense is possible only when actions are brought within two years of the time when the cause first accrues, is a sound one. See House Report 1754, 80th Cong., 2d Sess., 4; cf. Hearings before Subcommittee No. 1 of the House Judiciary Committee on H. R. 7236, 76th Cong., 3d Sess., 20, 38.

Speculation as to motivation, however, is fruitless, when, as here, the Congressional injunction as to limitations is clear. See *Kavanagh* v. *Noble,* 332 U. S. 535, 539, rehearing denied, 333 U. S. 850. The jurisdictional nature of time limitations on suits against the United States dictates strict judicial adherence thereto, and any exceptions must be created by explicit language and not by indirection. *Munro* v. *United*

States, 303 U. S. 36, 41 (1938); *Finn* v. *United States,* 123 U. S. 227 (1887); *Kendall* v. *United States,* 107 U. S. 123 (1882); *Edwards* v. *United States,* 163 F. 2d 268 (C. A. 9) (1947).

C. Every Other Court Which Has Passed on This Question Has Ruled That the Disability Provision of 28 U. S. C. 2401 (a) Does Not Apply to 28 U. S. C. 2401 (b)

The considerations previously elaborated have led all courts which have been presented with this question, save the court below, to rule that the disability provision contained in 28 U. S. C. 2401 (a) is inapplicable to toll the limitation on tort actions found in 28 U. S. C. 2401 (b). The question was first considered in *Whalen* v. *United States,* 107 F. Supp. 112 (E. D. Pa.) (1952), wherein a minor plaintiff brought suit under the Tort Claims Act for injuries received nearly five years previously. To defeat the Government's motion to dismiss on the ground that the action was time barred, the plaintiff's guardian relied on the disability provision of 28 U. S. C. 2401 (a). In rejecting this argument, and granting the Government's motion to dismiss, the district court stated (107 F. Supp. at 113):

> The above subsection [28 U. S. C. 2401 (a)] formerly appeared as part of § 24 (20) of the old Judicial Code, as amended, 28 U. S. C. (1940 Ed.) § 41 (20). It was part of our law long before the Federal Tort Claims Act came into existence. It was therefore independent of the latter Act. Merely because the subsections now appear under the same heading in the United States Code of 1948, as amended, it does not mean that the first subsection is to

control the following one. Subsection (a) has no legal effect on actions controlled by subsection (b) of Sec. 2401.

Subsequently, the *Whalen* decision was followed in *Foote, et al.* v. *Public Housing Commissioner of the United States,* 107 F. Supp. 270 (W. D. Mich.) (1952), in which an administrator's suit to recover damages arising out of the deaths of minor children was dismissed because of the running of the two-year period specified in 28 U. S. C. 2401 (b).

The court below rejected the rationale and holding in *Whalen,* and purported to distinguish *Foote.* It stated that in *Foote,* the issue at bar was never reached as the disability extensions were there denied because the persons for whom the disability was claimed were deceased, and that the court in *Foote* had ruled only that the disability provision in § 2401 (a) was restricted to the disability of living persons (R. 60).

Whalen, we submit, was correctly decided, as was *Foote.* Moreover, even a cursory reading of *Foote* makes it clear that the deaths of the minors were not the sole, or even the primary, basis for rejecting the disability argument. The court in *Foote* first discussed the different statutory origins of 2401 (a) and 2401 (b) and concluded (107 F. Supp. at 275):

> It can hardly be contended that the disability provision originally found in § 41 (20) was intended to apply to or have any relation whatever to the widely separated legislative enactment of the statute of limitations in the original Tort Claims Act, § 942. The legislative history of the 1948 revision of Title 28 U. S. Code, does

> not in any way indicate that the provision of § 2401 (a) relative to persons under disability was to apply to the limitation provision relative to tort actions in § 2401 (b). * * * In 1949 § 2401 (b) was amended to provide for a two-year period of limitation for tort actions against the United States, and again there is no indication that it was intended that the tolling provision of § 2401 (a) should apply to § 2401 (b).

Foote then goes on to quote approvingly from the language of *Whalen* (*supra,* pp. 24–25), and concludes that "the provisions of § 2401 (a) relative to persons under disability [are] not applicable to § 2401 (b)." 107 F. Supp. at 275–276. It is only thereafter that *Foote* states, in a single brief sentence, that "furthermore" the disability provision of § 2401 (a) relates only to the disability of living persons. 107 F. Supp. at 276.

In addition, in *Brereton* v. *United States,* Civil No. 890 S. D., District of South Dakota, decided February 17, 1955 (not reported), the district court determined without reference to either *Whalen* or *Foote* that the disability provision of 2401 (a) had no application to the Tort Claims Act limitation in 2401 (b).

Nor, it might here be added, do any considerations based upon purported equitable factors dictate an opposite conclusion. The Court of Appeals for the Second Circuit, in *Sgambati* v. *United States,* 172 F. 2d 297, certiorari denied, 337 U. S. 938, disposed of the contention that it was inequitable to deny the dispensation of a disability provision to a minor tort claimant, by pointing out that the plaintiff could have sued

by a next friend within the normal statutory period, 172 F. 2d at 298.[12] The situation is no different here. The district courts were available at all times to the minor Glenn's mother during the two years following his purported injury at the hands of Government employees, and suit could as readily have been brought by her then, as it has been now. The delay of nearly four years was not occasioned by any legal disability on the part of her son, but merely by her own inaction. In any event, as emphasized by this Court, jurisdiction to sue the Government "is not a matter of sympathy or favor. The courts are bound to take notice of the limits of their authority." *Edwards* v. *United States,* 163 F. 2d 268, 269 (C. A. 9) (1947), quoting *Reid* v. *United States,* 211 U. S. 529, 539.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be reversed with directions to dismiss the action as untimely.

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[12] Plaintiff in *Sgambati* brought his action alternatively under the Suits in Admiralty Act or the Public Vessels Act.

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